

DECLARATION BY JUDGE RAFAÂ BEN ACHOUR

1. I hereby express my dissent to the rejection, by the majority of the judges, of the request made by the applicants Habiyalimana Augustino and Muburu Abdulkarim for their release.
2. It is true that release is, in the Court's established case law, an exceptional measure that can only be ordered if "an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice".¹
3. Furthermore, the Court has established in its case law that release can only be ordered in *special and compelling circumstances*², i.e. if the procedural flaw on which the application is based is such as to fundamentally affect the proceedings before domestic courts.³
4. In this case, the Court held that "the violations it found did not affect the processes which led to the conviction and sentencing of the Applicant to the extent that he would have been in a different position had the said violations not occurred". It further considered that "the Applicant did not sufficiently demonstrate nor did the Court establish that his conviction and sentencing were based on arbitrary considerations leading to his continued incarceration being unlawful".

¹ *Evarist v. Tanzania*, *supra*, § 82 ; also see *Mussa and Mangaya v. Tanzania*, *supra*, § 96; *Mgosi Mwita Makungu v. United Republic of Tanzania* (substantive) (7 December 2018) 2 ACLR 570, § 84 ; *Elisamehe v. Tanzania*, *supra*, § 111 and *Ladislau Onesmo v. United Republic of Tanzania*, ACHPR, Application No. 047/2016, Judgment of 30 September 2021, § 93.

² See *Thomas v. Tanzania*, *supra*, § 157.

³ *Guéhi v. Tanzania*

5. However, it is clear from the judgment that a series of violations of the applicants' rights was committed and duly recorded by the Court⁴.

6. In the operative part of the judgment, the Court:

- *Holds* that the Respondent State violated the Applicants' right to consular services, and thereby violated Article 7(1)(c) of the Charter, read in conjunction with Article 36(1) of the VCCR;
- *Holds* that the Respondent State violated Article 7(1)(c) of the Charter, read in conjunction with Article 14(3)(a) of the ICCPR, with regard to the lack of interpretation services at the Applicants' trial;
- *Holds* that the Respondent State violated the Applicants' right to be tried within a reasonable time, as protected by Article 7(1)(d) of the Charter;
- *Holds* that the Respondent State violated the Applicants' right to life, as protected by Article 4 of the Charter, by imposing a mandatory death sentence on them, thereby disregarding the judge's discretionary power;
- *Holds* that the Respondent State violated the Applicants' right not to be subjected to cruel, inhuman, and degrading treatment, as protected by Article 5 of the Charter, through the actions of police authorities who are State officers;
- *Holds* that the Respondent State violated the Applicants' right to dignity, as protected by Article 5 of the Charter, on account of the death penalty's execution method, namely hanging;
- *Holds* that the Respondent State violated the Applicants' right to dignity, as protected by Article 5 of the Charter, on account of the excessive length of their detention on death row;
- *Holds* that the Respondent State violated the Applicants' right to dignity, as protected by Article 5 of the Charter, by subjecting them to deplorable conditions of detention.
- [...]]

⁴ Also see my opinions in the *Alex Thomas* (Judgment of 20 November 2015) and *Minani Evarist* (Judgment of 21 September 2018) cases.

- *Holds* that the Respondent State violated the Applicants' right to life, as protected by Article 4 of the Charter by virtue of its Penal Code's provision for the mandatory application of the death penalty, since this overrides the judge's discretionary power;
 - *Holds* that the Respondent State violated the Applicants' right to dignity, as protected by Article 5 of the Charter, on account of the death penalty's execution method, namely hanging.
7. Thus, no less than eleven (11) violations, which are by no means the least, have been found. Among these violations, there are at least three which have affected the proper conduct of the trial and could have changed its course, namely the lack of consular assistance, on the one hand, and the lack of interpretation services on the other, and, finally, the subjection to cruel, inhuman and degrading treatment by the police authorities. These are special and compelling circumstances which the Court should have taken into account and considered their release.
8. Failing an order for their release, the Court could, as it has been done in other cases, have ordered the reopening of the trial as an alternative measure to release.
9. Having failed to do so, I believe that the Court failed to draw the proper conclusions as a remedy for the many violations suffered by the applicants.

Judge Rafaâ Ben Achour

